

DEC 22 2003

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

JOHN HAAS,

Plaintiff - Appellant,

v.

TUCSON, CITY OF, a municipal
corporation, Incorporated in the State of
Arizona; LUIS GUTIERREZ, Former City
Manager; KAY GRAY, Finance Director;
ROBERT LEKO, Audit administrator; JANE
PRIOR, Finance Supervisor,

Defendants - Appellees.

No. 02-16924

D.C. No. CV-01-00344-BPV

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Bernardo P. Velasco, Magistrate, Presiding

Argued and Submitted December 1, 2003
Phoenix, Arizona

Before: O'SCANNLAIN, HAWKINS, and FISHER, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

The district court properly granted summary judgment to the City of Tucson on Haas's due process claim. The Civil Service Commission ("CSC") is a separate legal entity which was not named in the suit, and Haas has presented no proof that the CSC acts as an agent of the City when it conducts civil termination hearings. See Salt River Valley Water Users' Assoc. v. Giglio, 549 P.2d 162, 167 (Ariz. 1976) (in banc) ("A party asserting an agency relationship has the burden of proving it.").¹

The district court also properly granted summary judgment with respect to Haas's First Amendment retaliation claim. A claimant must show that his conduct is protected and that it was a substantial or motivating factor in the defendant's decision. Clements v. Airport Auth. of Washoe County, 69 F.3d 321, 334 (9th Cir. 1995) (citing Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977)). In considering whether particular speech is constitutionally protected, we balance the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [City], as an employer, in promoting the efficiency of the public services that it performs through its employees." Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

¹We also note that Haas could have appealed the decision of the CSC in state court, but did not do so.

The majority of Haas's speech, including Haas's internal complaint in 1996, three email exchanges with his supervisor in 1997, and statements made to his supervisor during an internal meeting in December 1999, did not involve matters of public concern. See Weeks v. Bayer, 246 F.3d 1231, 1235 (9th Cir. 2001) (First Amendment does not protect individual personnel disputes and everyday workplace grievances). Even if we assume that Haas's four wrongful conduct complaints filed in 1996 and his letters sent to the Mayor, Vice-Mayor and City Manager in December 1997 did involve matters of public concern, Haas has not raised a genuine issue of material fact that this speech was a substantial or motivating factor in his discharge more than two years later, see Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273-74 (2001) (per curiam) (adverse action taken 20 months later does not suggest causation), and, in any event, the City has presented uncontradicted evidence that it would have reached the same decision in the absence of the protected conduct. See Mt. Healthy, 429 U.S. at 287.

Finally, the district court correctly concluded that Haas has not alleged sufficient facts as a matter of law to show that defendants Prior and Gutierrez participated in the alleged constitutional deprivations.

AFFIRMED.